

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

MASTEC NORTH AMERICA, INC.,  
and MASTEC, INC.,

Plaintiffs,

v.

COOS COUNTY,

Defendant.

Civ. No. 04-278-AA

OPINION AND ORDER

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COOS COUNTY,

Third-Party Plaintiff,

v.

AMERICAN MANUFACTURERS MUTUAL  
INSURANCE COMPANY, ARCH  
INSURANCE COMPANY, INDUSTRIAL  
GAS SERVICES, INC., and PIPELINE  
SOLUTIONS, INC.,

Third-Party Defendants.

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and Pipeline Solutions, Inc.

AIKEN, Judge:

Plaintiffs MasTec North America, Inc. and MasTec, Inc. filed a Third Amended Complaint alleging claims against defendant Coos County for breach of contract, reformation of contract, assignment of rights, and *quantum meruit* arising from a contract for the construction of a natural gas pipeline project. In turn, Coos County asserts third-party claims for breach of contract and indemnification against Industrial Gas Services (IGS) and Pipeline Solutions, Inc. (PSI), parties that were employed by Coos County as "Project Advisors" for the pipeline project.

IGS and PSI now move for dismissal of Coos County's claims against them for failure to comply with Or. Rev. Stat. § 31.300. The motion is denied.

#### DISCUSSION

Or. Rev. Stat. § 31.300 bars suit against a "construction design professional" unless the claimant files a certification that

counsel "has consulted a licensed construction design professional who is qualified, available and willing to testify to admissible facts and opinion sufficient to create a question of fact as to the liability of the construction design professional." Or. Rev. Stat. § 31.300(2). If the relevant limitations period is approaching, counsel may file an affidavit in lieu of certification stating that counsel has attempted consultation with a qualified design professional and that the required certification will be filed within thirty days of the complaint or as allowed by the court. Id. § 31.300(3). Further, the certification or affidavit must be filed with or made part of the original complaint, counterclaim, cross-claim, or third-party complaint. Id. § 31.300(2), (3).

Here, it is undisputed that IGS and PSI are "construction design professionals" within the meaning of the statute, and that Coos County did not file a certification under § 31.300 when it filed third-party claims against IGS and PSI. However, Coos County argues that § 31.300 does not apply in this case, because it conflicts with the pleading requirements set forth in Federal Rule of Civil Procedure 8(a). Coos County emphasizes that the certification must attest that an expert construction design professional is qualified and willing to testify "as to the standard of care applicable to the alleged facts" and that "the alleged conduct of the construction design professional failed to meet the standard of professional care applicable . . . in the

circumstances alleged." Or. Rev. Stat. § 31.300(2).

I agree that § 31.300 arguably constitutes a pleading requirement, because a certification regarding the standard of care "applicable to the alleged facts" must be filed with or made part of the original complaint, suggesting that the complaint itself must contain particular allegations of fact. See Boone v. Knight, 131 F.R.D. 609, 611 (S.D. Ga. 1990). If so, § 31.300 is inconsistent with Federal Rule of Civil Procedure 8 which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a).

Even if no conflict with federal pleading requirements exists, I question whether § 31.300 is "outcome determinative" so as to constitute substantive state law this court must apply when sitting in diversity. See Snead v. Metropolitan Prop. & Cas. Ins. Co., 237 F.3d 1080, 1090 (9th Cir. 2001). Regardless of the forum, a plaintiff alleging claims against a construction design professional arising "out of the provision of services within the course and scope of the activities for which the person is licensed" still must establish that the construction design professional failed to meet the applicable standard of care. Or. Rev. Stat. § 31.300(2). Thus, the only significant impact of § 31.300 is that a meritless case against a construction design professional will be dismissed earlier in the proceedings. See id. at 1091 (discussing application of Oregon summary judgment

standards in burden-shifting discrimination claims).

Nevertheless, in this case, I need not decide whether § 31.300 conflicts with federal pleading requirements or constitutes substantive law. Even if § 31.300 applies to federal causes of action, the statute does not mandate dismissal with prejudice, and Federal Rule of Civil Procedure 15 provides that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a); Or. Rev. Stat. § 31.300(4); see Verizon Delaware, Inc. v. Covad Communications Co., 377 F.3d 1081, 1091 (9th Cir. 2004). Coos County attests that it gave notice to IGS and PSI in May of 2004 that it had consulted with a construction design professional who is qualified to testify as to IGS's and PSI's conduct with respect to the pipeline project, and IGS and PSI did not file their motion to dismiss until over one year after the filing of Coos County's third party claims. Therefore, neither party will be prejudiced by the filing of a certification under § 31.300.

Accordingly, Coos County is granted leave to amend its third party complaint and include a certification under § 31.300 that it has consulted with a construction design professional who is qualified and willing to testify with respect to IGS's and PSI's conduct as Project Advisors.

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CONCLUSION

IGS and PSI's Motion to Dismiss (doc. 94) is DENIED. Within thirty days from the date of this order, Coos County shall amend its third party complaint and file a certification under § 31.300 as directed.

IT IS SO ORDERED.

DATED this 7 day of July, 2006.

/s/ Ann Aiken  
Ann Aiken  
United States District Judge